IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 294 of 1984

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and

Hon'ble MR.JUSTICE C.K.BUCH

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

SAYAJI IRON WORKS(CONTRACTS)

Versus

COMMISSIONER OF INCOME TAX

Appearance:

MR JP SHAH for Petitioner

MR BB NAIK FOR MR. MANISH R BHATT for Respondent No. 1

CORAM : MR.JUSTICE J.N.BHATT and

MR.JUSTICE C.K.BUCH

Date of decision: 01/02/2000

ORAL JUDGEMENT (PER: J.N.BHATT, J)

1. For the relevant Assessment Year 1977-78, the

following questions have been referred for our opinion by the Tribunal :-

(1) Whether on the facts and in the circumstances of the case, the Tribunal was right, in law, in upholding the order of I.T.O. under Section 104 of the I.T. Act, 1961 ?

(2) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee ought to have declared dividend this year in respect of the interest which it disclosed in the return in C.Y.1978 and from which it also declared dividend in that year ?

2. Skeleton projection of the fact born out from the statement of facts may be stated at the out set.

3. The return of income was filed by the assessee on 30.6.1977 disclosing therein a total income of Rs.10,78,463-00. Subsequently, a revised return was filed on 21.8.1979 showing therein a total income of Rs. 14,14,143-00.

4. Thus, the difference between the income as per original return and the revised return was solely attributable to one item of Rs.3,35,047-00 being interest receivable by the assessee from a sister concern run in the name and style of M/s Patel Brothers, a partnership concern.

5. The contention propounded on behalf of the assessee was that it omitted to disclose the amount of interest as aforesaid while making the original return due to the fact that there was a mistake which was detected only in the year 1979 when the cross-verification of the accounts was undertaken. Obviously, the ITO, on the basis of the revised return determined the total income of the assessee at Rs.14,38,950-00. The total and correct income came to be reduced in appeal to Rs.14,22,337-00. On the basis of the total income as originally assessed, the ITO worked out distributable income at Rs. 5,60,283-00 after making adjustment under sec. 109 of the I.T.Act and also in accordance with the said distributable income, the assessee was required to distribute 45% thereof by way of dividend. Thus, the amount required to be distributed as dividend was worked out to Rs.2,52,126-00 against which the dividend actually distributed was worked out to Rs. 1,34,680-00 resulting into a short fall of Rs.1,17,446-00.

6. It is in this context that the ITO concerned initiated action for imposing additional tax by invoking

aids of the provisions of sec.104 of the I.T.Act. The assessee had contended that the provisions of sec.104 of the I.T.Act would not be applicable firstly as it had distributed its profits by way of dividend on the basis of the profits as disclosed in P & L Account. Secondly, it was contended that the difference between the income originally returned and what was disclosed in the revised return was due to the omission or mistake in not accounting the interest as aforesaid. Thirdly, it was contended that interest which was not originally disclosed came to notice, only, in calendar year 1978. ITO rejected all these contentions raised on behalf of the assessee for the reasons stated in the order and, inter alia, holding that it was not possible to believe that the assessee was unaware of the accrual of income from interest and that it had sufficient profits and reserves from which adequate dividend could have been declared. The ITO, therefore, after taking concurrence of I.A.C., imposed additional income tax of Rs. 70,275-00. Obviously, the said levy was determined on the basis of the revised total income after giving effect to the decision in appeal.

7. Obviously, the matter was carried in appeal before the CIT(A) by the assessee and he partly succeeded. CIT(A), relying on the principles and decision expounded in " Gangadhar Banerjee Co.Pvt.Ltd. v/s CIT, 57 ITR 176 ", held that the provisions of sec.104 were not applicable. It was further held that the amount of interest as aforesaid could not have formed part of commercial profits of the assessee and, therefore, placing reliance on the aforesaid decision, quashed the order of the I.T.O.

8. As a result of which, Revenue, being aggrieved by the order passed by the CIT(A), rushed to the Tribunal. Rival contentions were advanced. The Tribunal, after considering the facts and rival contentions, observed that " section 104 of the I.T.Act, 1961 is a penal section and that an objective approach and a sympathetic approach was necessary in order to consider the question whether the declaration of dividend was reasonable or not. However, the Tribunal quashed the finding of CIT(A) founded upon the ground that the interest income could not form part of commercial profits. It was also noticed by the Tribunal that the said interest was earned by the assessee from an associate concern the management of which was, closely, linked with the assessee company. It was also observed that that apart, substantial advances were made to the said firm, namely Patel Brothers and the income from interest formed part of about 1/5th of the income of assessee company. It was also observed that even in Form No. 19A filed by M/s Patel Brothers on

20.1.1977, it is undertaken to deposit the tax deducted at source on the amount of interest. The explanation of the assessee that there were disputes with M/s Patel Brothers did not find favour with the Tribunal.

9. The Tribunal also observed that the assessee had taken up self-conflicting explanation before the ITO and the I.A.C. in this regard. It was also noticed by the Tribunal that the Debtor firm had, already,intimated to the ITO about the deduction of tax made by it on the interest accrued to the assessee firm much before the expiry of the period of 12 months during which the dividend was required to be declared.

10. It is in this context and reasons the Tribunal reached to the conclusion that there was a fit and appropriate case for invoking powers under sec. 104 of the I.T.Act as the case fell squarely within the ambit of said section. Consequently, the order of CIT(A) was quashed and reversed and the Tribunal restored the order of ITO imposing additional income-tax.

11. At the instance of assessee, as stated herein above, aforesaid questions came to be referred to us for our opinion.

12. Learned Advocate Mr. Shah for the assessee strenuously and strongly placed reliance on the decision of the Hon'ble Apex Court rendered in " CIT v/s Shri Iron Foundry Engineering Works Ltd., 225 ITR 684". It was contended by him that Revenue itself has not thought it fit and expedient to invoke provisions of sec. 171(1) of I.T.Act for imposing penalty and the assessee himself had filed revised return on finding out the mistake and had also declared and distributed dividend in the subsequent year i.e. 1978-79 in respect of the income earned and that would go to show that this is not a fit and proper case for exercise of powers under section 104 of the I.T.Act as it is penal in nature and except mistake, nothing has been shown from the record. Prima facie, the submission of Mr. Shah would appear to be alluring, but not acceptable, substle, but not sound when we go to the reality of entire scheme of sec.104 of the I.T.Act coupled with special facts and circumstances of the present case. We have, therefore, no option but to raise our hands in helplessness in accepting said contention and hence we reject the said contention.

13. After having considered rival submissions, factual scenario, the underlined purport and design of section 104 of the I.T.Act, without entering into any other meticulous or niceties of discussion, we are of the clear opinion that in so far as question no.1 is concerned, it is required to be decided in affirmative. Therefore, our answer to Question No.1 is in the affirmative, against the assessee and in favour of the

revenue.

14. In so far as formate and frame of second question is concerned, it is consensually stated that there is no such survival value of Question No.2 since it is ancillary and corollary. Therefore, there is no need to answer and formal answer is not necessary.

15. In view of above facts and circumstances, Reference under section 256(1) of the I.T.Act shall stand rejected with no order as to costs.

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